ethomas@prestongates.com
(206) 370-7631

December 4, 2006

Via email (tlor461@ecy.wa.gov) and U.S. Mail

Mr. Tom Loranger
Regional Water Resources Manager
Washington Department of Ecology
300 Desmond Drive
Lacey, WA 98503

Re: S2-29934: Comments of Lake Tapps Community Council on Draft ROE

Dear Mr. Loranger:

I am writing on behalf of the Lake Tapps Community, represented by the Lake Tapps Community Council (the "Community Council"), to provide the Community Council's comments regarding the draft Report of Examination ("ROE") for Puget Sound Energy's ("PSE") pending municipal supply water right application to the Washington Department of Ecology ("Ecology"), No. S2-29934. The Community Council appreciates all the information that Ecology has provided and Ecology's willingness to consider comments filed through December 4, 2006. Through this comment letter, the Community Council provides background information about its interests and comments on the following issues:

1) Minimum instream flows ("MIFs") for the White River
   a) Magnitude of flows
   b) Compliance point for White River flows
   c) Operational tolerance
2) Flow regime for Lake Tapps
   a) Inflow regime
   b) Water quality considerations
   c) Potential impairment
3) Overriding considerations of the public interest ("OCPI")
   a) Recreation and aesthetics
   b) Local support for fisheries and other interests
   c) Releases to address shortfalls in the Puyallup River
   d) Hydropower generation
4) Interpretation and implementation
   a) Conditions for Phase II

Interests of the Community Council

The Community Council represents the following organizations: West Tapps Maintenance Company, Tacoma Point Improvement Club, Driftwood Point Maintenance Company, Church Lake Maintenance Association, Inlet Island Maintenance Company, Tapps Island Association, Snag Island Maintenance Association, the Save Lake Tapps Coalition, and Friends of Lake Tapps, each a Washington state not-for-profit association, which in turn represent residents of the Lake Tapps area. The members of the Community Council have entered into an Agreement Regarding Reservoir Management between PSE and the Lake Tapps Community dated as of March 31, 2004 with PSE (the "Reservoir Management Agreement") regarding management of the lake.

When Ecology's decision on this water right application was previously appealed to the Pollution Control Hearings Board ("PCHB"), the PCHB granted the Community Council's petition to intervene, over the objections of some appellants, based on the Community Council's showing of a variety of residential, recreational and ownership interests that may be directly affected by Ecology's water right decision and its impact on water levels in Lake Tapps. Numerous residents of Pierce County and local cities own property along the shores of Lake Tapps. These residents and thousands of others who enjoy the Lake Tapps Park on the north shore and the City of Bonney Lake Allen Yorke Park on the south shore of Lake Tapps count on the maintenance of recreational levels during the summer season for swimming, boating, water skiing, fishing and other forms of recreation. These communities and many of the property owners also rely on wells that are subject to impact of lowered lake levels.

During the 2003 dike renovation activities, some wells either went dry or became unusable for a period of time coinciding with the extreme drawdown of the lake. An Ecology decision on PSE's water right application that led to low lake levels could impair the existing water rights associated with these wells. Ecology must consider this potential impairment. RCW 90.03.290(3).

Lake Tapps Park is a popular swimming, boat launch and recreational area in North Pierce County. Bonney Lake's Allen Yorke Parke is similarly used by the public. At Lake Tapps Park, the largely undeveloped 80-acre site has approximately 10,000 feet of waterfront, restrooms, trails and a seasonal food concession. County residents use the park extensively for boating, swimming, hiking, picnicking, bird-watching and other recreational purposes. There are approximately 150,000 to 250,000 visits to the park annually. The recreational and aesthetic values of the park could be harmed by an Ecology decision on the water right that results in reduced lake levels. Ecology should consider these impacts in connection with its evaluation of the public welfare under RCW 90.03.290(3).

The Community Council affirms its interest in the well being of the White River fisheries. However, the Council is disappointed that no fish targets have been set. No target data appear to be available, calling into question any flow-related targets.

Comments of the Community Council

1) Instream flow regime for the White River

a) Magnitude of flows

The Community Council is particularly concerned about provisions in the proposed water right and positions taken by other parties relating to instream flows for the White River. We understand that to date, discussions concerning the potentially competing interests of maintaining lake levels and providing instream flows for the White River have been driven by recommendations of the National Marine Fisheries Service ("NMFS"). NMFS has issued at least two sets of recommendations – one documented only through a November 2003 draft biological opinion, and the other not documented in any manner, as far as the Community Council is aware. In what appears to be an abundance of caution, the ROE appears to have adopted NMFS' undocumented recommendations as the baseline. The Puyallup Tribe has advocated even higher summer flows,[1] even though the summer flows proposed in the ROE are almost four times as great as those provided by PSE pursuant to an agreement with the Muckleshoot Tribe. *Absent a broad-based agreement among key stakeholders – at a minimum, the Community Council, the County, PSE, and CWA – Ecology should resist any proposal to further increase White River MIFs and should retain the MIFs proposed in the ROE because these MIFs are more than sufficient to support fisheries interests and there is no scientific evidence and there are no public interest considerations to support increased MIFs.*

NMFS' draft Biological Opinion was issued in connection with PSE's license application, since withdrawn, to the Federal Energy Regulatory Commission ("FERC") for its White River Hydroelectric Project. The draft Biological Opinion assumed continuing hydropower operations and recommended maintaining instream flows in the White River on the order of 250 to 350 cfs during summer months for fishery purposes. However, without explanation, the draft Biological Opinion then recommends that PSE temporarily release 500 cfs for periods in June, July, August or September when certain water temperatures are exceeded. The draft Biological Opinion contemplates that PSE and NMFS would verify the feasibility of this alternative prior to its implementation.

Although the draft Biological Opinion was never finalized, it was the subject of review and discussion among parties who have been participating for years in discussions surrounding Lake Tapps. At the time of the release of the draft Biological Opinion, its instream flow

[1] A link to the Tribe's proposal is at http://www.agreementdynamics.com/AMP.htm.

recommendations were viewed as surprisingly stringent – so much so that PSE withdrew its FERC application and ceased hydropower operations. In December 2003, NMFS' Northwest Regional Administrator recommended that the Corps' interim operation of the diversion dam (after termination of PSE hydropower operations) meet the instream flow recommendations contained in the 2003 draft Biological Opinion.[2]

Just two months after NMFS' Regional Administrator recommended PSE's compliance with the terms of the 2003 draft Biological Opinion, NMFS staff provided PSE with an alternative minimum flow regime that is inconsistent with the 2003 draft Biological Opinion, and that is not subject to the same requirement to verify its feasibility.[3] These revised recommendations are set forth in a table provided to PSE.[4] The Community Council has never been able to obtain any information about the derivation of these new, inconsistent recommendations, and believes that NMFS has never "shown its work" in this regard, at least not to the public.

Ecology's incorporation of the NMFS' March 2005 recommendations[5] into the forthcoming water right would cause the Lake to suffer a loss of recreational levels in the summer in at least three of the past 12 [25%] study years.[6] The study years ended in 2002. There are four additional years beyond those included in the study that have not been analyzed, including this year (2006). The Community Council is certain 2006 would have also been a problem year and strongly suspects that one or two of the other years 2003-2005 would have experienced difficulties. The Community Council is also concerned that studies to date have used unrealistic assumptions regarding system gains and losses, and real-time control of system gates.

---

[2] Letter dated December 19, 2003 from NMFS' Robert Lohn to PSE's Edward Schild ("our general concerns regarding the operation and effects of the diversion structure are expressed in our draft biological opinion on the Project operations, and operations consistent with the draft are likely to address the kinds of concerns we would have regarding protection of listed fish in the White River") (copy enclosed for reference).

[3] In effect, the revised recommendations eliminate temperature triggers contained in the 2003 draft Biological Opinion and instead mandate high flows regardless of instream conditions.

[4] *See, e.g.*, Exhibit B.4, B.5 and B.7 to the September 26, 2005 Cooperative Agreement between the United States Army Corps of Engineers, Seattle District and PSE: Addendum to 1948 Agreement for Interim Operation.

[5] *See* Exhibit B.4 to the September 26, 2005 Cooperative Agreement between the United States Army Corps of Engineers, Seattle District and PSE: Addendum to 1948 Agreement for Interim Operation (letter dated March 10, 2005 from NMFS' Robert Lohn to the Corps' Colonel Debra Lewis) at page 4 (500 cfs from July – October; 350 cfs November-March; 400 cfs April – June).

[6] Ecology "Compiled Draft as of 20/26/06" at page 7, table showing Memorial Day-Labor Day.

We suggest that Ecology give careful consideration to a determination of how instream flows should vary over a range of conditions for dry and wet years. *See* U.S. Department of the Interior Record of Decision on Trinity River Mainstem Fish Restoration Final Environmental Impact Statement/Environmental Report (December 2000).[7] With this refined approach, any instream flow requirements for the White River would be lower in dry than wet water years. This could be done as an element of issuing approval for Phase II of the WSP development.

b) Compliance point for White River flows

The ROE should provide that determinations of White River MIF compliance will be made at a point in the White River that is downstream from the point where flows through the fish screens are returned to the White River. This is an important clarification that accounts for these return flows. For example, assuming a 500 cfs minimum flow requirement in the White River, 480 cfs of this minimum flow could be released from the diversion dam, with the remainder provided by return flow (assuming the return flow amounts to at least 20 cfs). This approach to monitoring White River minimum flow compliance is consistent with NOAA Fisheries guidance. This compliance point and the related assumptions regarding its implementation should be specifically called out in the ROE as an element of the stream flow monitoring requirements set forth in § 5.3.20.

c) Operational tolerance

The ROE should also provide that White River MIF compliance is determined within an operational tolerance of plus/minus 5 percent. As with the recommendation for a compliance point below the fish screen return flow, this clarification takes into account the fact that natural river fluctuations and equipment limitations make it impossible to constantly operate at a precise minimum instream flow. A plus/minus five percent tolerance is conservative, but as equipment is improved over time, it is a reasonable tolerance. This operational tolerance should also be specifically called out in the ROE as an element of the stream flow monitoring requirements set forth in § 5.3.20.

2) Flow regime for Lake Tapps

a) Inflow regime

Section 5.3.11 should be modified to provide for a diversion *optimization* plan instead of a diversion *minimization* plan in order to balance the interests of fisheries, municipal water supply, recreation, recharge and public safety. A requirement for "minimization" seems to be premised on an assumption that White River flows need to be maximized. However, the water

[7] A copy is available at http://www.schlosserlawfiles.com/TrinityRiver/ROD12-19-00(b).pdf.

right would already incorporate the NMFS MIFs for the White River and there is no scientific evidence to suggest that higher flows are necessary or even helpful to the fishery.[8] With an "optimization" plan, decision makers can develop a refined approach, based on current science and data, to strike an appropriate balance among various interests.

Likewise, the caps on inflow to the lake[9] do not appear to be grounded in any specific fisheries or other need, but they do operate to slow refill of the lake when water is abundant. Capping the inflow could also eliminate the project's ability to assist in flood control. While we recognize this is not the intended use of the project, in view of past flooding events, it is an important consideration for Ecology when considering public interests. Thus the caps may jeopardize the multiple interests associated with lake levels without benefiting any other interest. Incorporation of the NMFS MIFs for the White River into the water right will fully protect fishery interests. Any cap on diversions to the lake is therefore superfluous and should be eliminated.

b) Water quality considerations

ROE section 3.4.1 considers several scenarios for inflows to the lake. The focus of this analysis is water quality. In light of the public interest in maintaining lake levels to serve recreational, aesthetic, wildlife and recharge purposes, Ecology should also evaluate these scenarios for potential impact on lake levels. Accordingly, at the end of the recreational season, an adaptive management approach should be implemented to set a tailrace regime that balances the water quality needs for flushing and recreational needs for lake levels. The start date will vary between wet and dry years, but should be as soon as lake levels are threatened and provide for reduction or elimination of tail race releases. See ROE lines 1058-1059. In the late season, flushing is less necessary for water quality purposes because the lake will soon be in draw down mode.

c) Potential groundwater right impairment

In acting upon PSE's application, Ecology must consider potential impairment of existing water rights. RCW 90.03.290(3). These rights include rights to groundwater wells in the vicinity of the lake, which are apparently dependent in part upon recharge from the lake. During the 2003 dike renovation activities, some wells either went dry or became unusable for a period of time coinciding with the extreme drawdown of the lake. Lake Tapps provides up to about a third of recharge for some wells. ROE at 1518-1519. Thus an Ecology decision on PSE's water

[8] In addition, increasing flows may create *spawning* habitat but will reduce juvenile *rearing* habitat in the White River. It appears that juvenile habitat may be limited, and that increasing flows will further reduce already limited juvenile habitat. *See* NMFS BiOp and PSE Weighted Usable Area curves. Ecology should evaluate this issue in considering higher minimum flows.
[9] *See* ROE at lines 2757-2760 (500 cfs during spring refill; 375 cfs at other times).

right application that led to low lake levels could impair the existing water rights associated with these wells.

A number of factors that are presently unknown could adversely affect the ability of the lake to provide sufficient recharge for groundwater wells. These include, without limitation:

- The potential impact of the CWA's full usage of its water right during the summer months, which would be 150 cfs rather than the 83.3 cfs that was modeled.

- Drought year conditions. In a drought year, the combined impact of the new White River MIFs and the WSP on lake levels will be quite significant, and could have a potentially significant impact upon recharge. Although the ROE attempts to evaluate this issue, uncertainties regarding groundwater movement, extent of leakage from the lake, etc., particularly when coupled with the flawed modeling assumption that even in a drought year CWA would need no more than 83 cfs from the lake in June and July, the impact may be substantially greater than anticipated. *See* ROE lines 1517-1554.

- The potential for global warming to reduce system inflows. Ecology has acknowledged the potential adverse impact of climate change upon water supplies.[10]

- The potential for future hydropower generation to reduce lake levels and lake storage volumes.

- Uncertainty associated with currently available data due to inaccuracy of gauges, lack of data from 2003-2006, etc.

- Uncertainty associated with having to rely upon models, with sometimes untested assumptions and as yet undiscovered potential glitches in formulae.

The Community Council believes that under these circumstances, it is impossible to have sufficient data to make a conclusive determination of non-impairment for Phase II. The Community Council therefore urges Ecology to clarify the conditions relating to construction of Phase II as set forth in its comments in Part 4 below on interpretation and implementation.

---

[10] *See* http://www.ecy.wa.gov/programs/wr/ws/wtrsuply.html (providing links to 12 websites on global warming and climate change as sources of "information can be used to evaluate present and future water supply conditions in the state."); and http://www.psat.wa.gov/Publications/climate_change2005/climate_home.htm (Puget Sound Action Team publication, accessed via Ecology's website, concludes that climate change will lead to less streamflow in the Puget Sound basin during summer months).

3) Overriding considerations of the public interest ("OCPI")

a) Public Interest in Lake Tapps' provision of recreation, aesthetics, wildlife habitat and groundwater recharge values

The Community Council appreciates and endorses Ecology's determination that maintenance of Lake Tapps serves the public interest through providing recreation for boating and swimming, wildlife habitat,[11] and recharge to local aquifers. ROE at lines 2607-2623. These public interests qualify as overriding public interests, justifying the issuance of a water right in a closed basin, provided that they are sufficiently protected through the terms and conditions of the water right. The Community Council believes that the conditions recommended in these comments to protect the lake are necessary to adequately protect the public interests served by the lake.

We note that Ecology has not yet evaluated the potential impact of the CWA's full usage of its water right during the summer months. The analysis to date assumes that CWA would use 83.3 cfs on a continuous basis in June and July, rather than the 150 cfs the water right would authorize. ROE at lines 1255-1257. That appears to be a faulty assumption. Based on statements from CWA representatives, we understand that CWA's months of peak demand likely include June and July, which are important months for recreation on Lake Tapps. Moreover, our analysis indicates that low lake levels in July have a domino effect on lake levels in August. In other words, if the lake drops below Normal Full Pool[12] in July, chances are that recreational values will be lost for August too. Without the clarification of Phase II conditions proposed by this letter, there is a substantial risk that the failure to model full exercise of the water right, coupled with other uncertainties, will have a much greater impact on the recreational and other uses of the lake that is presently contemplated.

---

[11] Members of the Community have observed osprey, eagles, and turtles that live on the lake. The Western Pond Turtle, an endangered species, has been observed in the area and may use the lake. In any event, the Community understands that the lake is proper habitat for that endangered species. We are uncertain of the degree to which these wildlife impacts have been considered.

[12] The Reservoir Management Agreement Section 1.1 defines Normal Full Pool as 541.5 to 543 msl as measured at USGS gage 12101000. We note that all lake level elevations discussed in the draft ROE, like the Reservoir Management Agreement, refer to a system of elevation numbers that was in place prior to 1929. The current USGS gauges now read 0.7 feet higher as a result of a post-1929 sea level measurement adjustment. Accordingly, at some point, it may be desirable to revise all elevation figures to reflect this change of metrics. Accordingly, the maximum Normal Full Pool would be adjusted from 543 to 543.7; and the minimum Normal Full Pool from 541.5 to 542.2 msl.

b) Local support for fisheries and other interests

The Community Council notes that there is extensive local support for fishery interests. For example, we understand that Pierce County has spent millions of dollars designed to address fishery interests through levee setbacks, habitat enhancement, water quality studies and measures, etc. The Community Council believes that these contributions are far more valuable to the fishery than any further increase in White River MIFs.

c) Releases to address shortfalls in the Puyallup River

Releases of water from Lake Tapps to the Puyallup River designed to address shortfalls in the Puyallup (the "Puyallup MCDs") are unnecessary to provide overriding considerations of the public interest for several reasons. First, the White River was historically unconnected to the Puyallup; it was artificially re-routed. Thus releases from Lake Tapps, which is supplied by the White River, do nothing to restore natural conditions.

Moreover, the Puyallup MCDs cannot be justified as mitigation for the WSP withdrawals because they far exceed the impact that the WSP has on Puyallup MIFs. *See* ROE at Table 12 (WSP only increases summer shortfalls by 9 days). Essentially the Puyallup MCDs shift the burden for problems that largely occur upstream on the Puyallup River onto the Lake Tapps community. The Community Council believes that any potential impairment by the WSP of the water right associated with the regulatory Puyallup River MIFs would be wholly addressed through the increased flows in the White River resulting from Ecology's incorporation into the water right of the NMFS White River MIFs.

Finally, and most importantly, any public interest in the Puyallup MCDs comes at the expense of the overriding public interests in maintaining Lake Tapps for recreational, aesthetic, wildlife and recharge purposes.[13] Thus, on balance, the proposed Puyallup MCDs harm rather than help the public interest and should be eliminated.

d) Hydropower generation

The final water right should specify that hydropower generation is the lowest-priority use of the lake. Although Lake Tapps is not presently used for hydropower generation, that is a possibility for the future. The ROE leaves the door open to hydropower generation. *See* ROE at lines 333-348 and 3085-3090 (if hydropower use is restarted, it will be subject to all the conditions of the ROE). Two separate applications have been filed with the FERC seeking a hydropower license for the lake.[14] Hydropower generation adversely affects lake levels because

[13] Ecology "Compiled Draft as of 20/26/06" at page 3, table showing Memorial Day-Labor Day.
[14] FERC Docket No. P-12685, applications of Don L. Hansen and of Rainier Engineering and Environmental LLC.

it removes water from the lake and discharges it to the Puyallup River, without any inflow to the lake beyond what will be authorized under the new water right. In recognition of the public interest considerations associated with water quality, recreational use and aesthetics, hydropower use should not be allowed to impair maintenance of Normal Full Pool from May through October.

Accordingly, the Community Council recommends that the final ROE include the following additional text on page 19, after line 636, on a new line: **"**5. Hydropower generation.**"**

4) Interpretation and implementation

a) Conditions for Phase II

The potential impact of the CWA's full usage of its water right during the summer months. The analysis to date assumes that CWA would use 83.3 cfs on a continuous basis in June and July, rather than the 150 cfs the water right would authorize. ROE at lines 1255-1257. That appears to be a faulty assumption. Based on statements from CWA representatives, we understand that CWA's months of peak demand likely include June and July, which are important months for recreation on Lake Tapps. Moreover, our analysis indicates that low lake levels in July have a domino effect on lake levels in August. In other words, if the lake drops below Normal Full Pool[15] in July, chances are that recreational values will be lost for August too. Existing White River stream gage information is highly unreliable. This fact strongly suggests that flow analysis may be based on incorrect assumptions, and may not reflect an accurate depiction of actual conditions. As discussed in Part 2(c) above, there is a substantial uncertainty regarding how CWA's phase II would actually affect lake levels and associated recreational use and water rights, in part because full Phase II usage was not even modeled. There is also uncertainty regarding the potential effects of global warming, hydropower generation, and other future conditions.

Ecology should acknowledge the intent of the parties to provide for stable lake levels. In Section 5.2.1 of the ROE, Phase II should be expressly conditioned upon a determination at the time the permit holder submits proof of beneficial use that predictions for lake levels during the Annual Recreational Period[16] that have been made based on current analytic tools remain accurate within +/- 10%.

Conclusion

[15] The Reservoir Management Agreement Section 1.1 defines Normal Full Pool as 541.5 to 543 msl as measured at USGS gage 12101000.
[16] The Reservoir Management Agreement, section 1.1, defines Annual Recreational Period as the period from April 15 through October 31.

Lake Tapps is a valuable public resource. There is a tradeoff between enhancement of White River flows and protection of the lake. Given the potential impact of Ecology's water rights process on the Lake Tapps community, we urge you to consider carefully the comments herein. Doing so will help insure Ecology's process reflects consideration of the best available scientific information, and it will help avoid potentially significant impacts on area residents. Representatives of the Community Council would be pleased to provide any additional information about these comments that you would find helpful. Thank you very much for your consideration.

Very truly yours,

PRESTON GATES & ELLIS LLP

By
Elizabeth Thomas

ET:et
Enclosure
cc: Chris Anderson (cand461@ecy.wa.gov), Department of Ecology
Hon. Shawn Bunney
Hon. John Ladenberg
Don Fisher
Ralph Mason
Kirk Shuler
Leon Stucki

K:\49156\00001\ET\ET__L238H